


Memorandum

Date **June 24, 2008**

To **Don Koch, Director**
Department of Fish and Game

From **Ann S. Malcolm, General Counsel** 
Department of Fish and Game - Office of the General Counsel

Subject : **Legal Standard for Candidacy Determination**

Introduction

The Fish and Game Commission (Commission) received a petition to list Pacific fisher as threatened or endangered under the California Endangered Species Act (CESA). This memorandum outlines the applicable legal standard for the Commission to use when determining whether the petitioned listing of a species as threatened or endangered "may be warranted" pursuant to Section 2074.2 of the Fish and Game Code (FGC), which triggers protection for the species as a candidate for listing under CESA. The Center for Biological Diversity and timber industry representatives have also provided their interpretation to the Department of Fish and Game (Department) on what they believe the standard to be.¹

The Department has completed its required evaluation of the petition to list Pacific fisher and, along with this memorandum, is forwarding its evaluation report to the Commission. The evaluation report contains a recommendation from the Department that the Commission reject the petition as it does not contain sufficient information to indicate the petitioned action may be warranted.

Applicable Legal Standard

At this stage in the listing process, FGC section 2074.2(a) provides that the Commission is required to consider the petition, the Department's evaluation report and other comments received to determine whether the petition does or does not provide "sufficient information to indicate that the petitioned action may be warranted..." FGC section 2072.3 describes the required information as *scientific* information. The standard that applies to the Commission's decision on candidacy is the same standard the Department is required to apply as it evaluates the petition and prepares its recommendation to the Commission. In accordance with FGC section 2073.5(a), the Department is required to evaluate whether there is or is not "sufficient information to indicate that the petitioned action may be warranted" based on its evaluation of "the petition on its face and in relation to other relevant information the department possesses or receives..." FGC section 2072.3 and associated regulation, 14 CCR section 670.1 (d), also specify categories of information that must be included in the petition: "population trend, range, distribution, abundance and life history of a species, the factors affecting the ability of the population to survive and reproduce, the degree of immediacy of the threat, the impact of

¹ Letter from Center for Biological Diversity to Eric Loft, Ph.D dated May 23, 2008; Letter from Green Diamond Resource Company to Dr. Eric Loft dated May 28, 2008.

existing management efforts, suggestions for future management, ...the availability and sources informationL]... information regarding the kind of habitat necessary for species survival, a detailed distribution map, and any other factors that the petitioner deems relevant."

The candidacy standard of "sufficient information to indicate that the petitioned action may be warranted" is higher than the "fair argument" or "substantial evidence" standard found in the California Environmental Quality Act, but lower than the "reasonable probability" standard required for a preliminary injunction, the Third District Court of Appeal ruled in *Natural Resources Defense Council v. Fish and Game Commission* (1994) 28 Cal.AppA^{1h} 1104, 1125 (NRDC). The court articulated the "sufficient information" standard as follows: the Commission should conclude the petitioned action may be warranted for candidacy purposes when it finds "that amount of information, when considered in light of the Department's written report and the comments received, that would lead a reasonable person to conclude there is a substantial possibility the requested listing could OCCUr.,²

The NRDC ruling specifically rejects the view that a species can become a candidate for listing under CESA only if the Commission concludes the species is more likely than not to be listed at the end of the process. On the other hand, the court opinion recognizes there may be petitions that show a real prospect for listing that is so remote that a reasonable person would not consider it a substantial possibility. In such a case, the "may be warranted" standard would require the Commission to reject the petition.

The candidacy standard is properly viewed as a standard that is less rigorous than the "is warranted" standard that must be employed by the Commission in making its final decision to list a species. The NRDC ruling notes that the "may be warranted" standard "stands in sharp contrast" to the Commission's decision whether to actually list the species as threatened or endangered, and thus give the species long-term protection under CESA.³

The Third District Court of Appeal acknowledged that the decision necessarily requires the Commission to weigh evidence and exercise its judgment. The process, according to the court, involves taking evidence for and against listing in a quasi-adjudicatory setting, weighing that evidence, and determining, in the Commission's discretion, what is essentially a question of fact.⁴

Importantly, the candidacy standard under CESA as discussed in NRDC is also different than the standard governing candidacy determinations under the federal Endangered Species Act (ESA). Similar to CESA, the ESA casts federal candidacy determinations in terms of whether the petition presents substantial information indicating the petitioned action "may be warranted."s Yet, in contrast to the NRDC decision under CESA, federal courts have interpreted the federal candidacy standard under ESA as simply turning on whether the petition presents "information that would lead a reasonable person to believe" the petitioned action may be warranted.⁶ Indeed, a recent federal trial court decision in California held that ESA's "may

² NRDC, *supra*, 28 Cal.App.4th at 1125.

³ *Id.* at 1122.

⁴ *Id.* at 1126.

⁵ 16 U.S.C. § 1533(b)(3)(A); see also 50 C.F.R. § 424.14(b)(1).

⁶ See, e.g., *Moden v. U.S. Fish & Wildlife Service* (D.Or. 2003) 281 F.Supp.2d 1193, 1203-1204; *Center for Biological Diversity v. Morgenwick* (D.Colo. 2004) 351 1137 1141.

be warranted" candidacy standard "seems to require that, in cases of || contradictory evidence, the Service must defer to information that supports [the] petition's position."? The state standard under CESA, in contrast, as interpreted by *NRDC*, sets the candidacy bar higher with a "substantial possibility" requirement. The state standard may be higher, in part, because unlike the federal standard, the "take" prohibition under CESA extends to candidate species.⁸

The Commission will need to refer to the legal standards for listing under CESA to determine whether there is sufficient information to lead it to conclude that there is a substantial possibility of listing. Those standards are found in the definitions of "endangered species" and "threatened species" at FGC sections 2062 and 2067, respectively.

Finally, as you may know, the governing statutes require the Commission to base a candidacy determination on scientific information in the petition or from other sources, not on non-biological factors such as economic consequences of the petition's acceptance. Significantly, the information that FGC section 2072.3 requires to be included in the petition does not include any economic or other non-biological factors. In the *NRDC* opinion, the court stated that candidacy determinations under both CESA and the federal Endangered Species Act were "to be based on science, not economics."g

Conclusion

While various groups providing comments seem to disagree in some part about the appropriate legal standard for the Department's review of the petition and the Commission's decision on whether to make fisher a candidate species, they appear to agree with the Department that the controlling law on this matter is contained in the *NRDC* case. This memorandum attempts to articulate those standards in an objective manner to help guide the Commission as it moves forward in the CESA process.

Thank you for your consideration of these issues. If you or the Commission have any questions, please let me know.

cc: California Fish and Game Commission
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⁷ *Center for Biological Diversity v. Kempthorne* (N.D.Cal. January 19, 2007, No. C 06-04186 WHA) 2007 WL 163244.

⁸ Fish & G. Code, §§ 2080, 2085.

⁹ *NRDC, supra*, 28 Cal.AppAth at 1118, footnote 11.